No. 10992

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURNCE COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District, and TEX HADDON,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGON, NORTHERN DIVISION.

Reply Brief of Appellants

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PRELIMINARY STATEMENT

Appellees, in their enthusiasm to state the facts in the strongest possible light, overstate themselves on page 5 in saying that the evidence is "*uncontradicted* that the employee sustained an injury to his back while working and was immediately given lighter work," etc. Such a statement completely ignores the testimony of Ar-

thur E. Lukehardt, claimant's immediate superior, who testified that "there was no change in the type of work he performed" (Tr. 99). Also, the statement that "his fellow *employees* and *superiors* testified that the employee was a good worker and in full vitality before the injury and that after the injury he continually complained of his back and legs and would retire to his bunk after work, following his evening meal," is not borne out by the record. Only one fellow employee testified in favor of claimant, and he admitted that he was not present when the alleged injury took place. No *superior* testified to the effect claimed by appellees. In fact both superiors who testified said nothing whatsoever concerning claimant's vitality before and after the alleged injury, nor about his activities following the day's work.

Again at page 6, appellees refer to the testimony of fellow *employees* and *superiors* who "testified to the injury and to its immediate and continued effects." In the first place, only one fellow employee testified, so why the use of the plural? In the second place, that fellow employee admittedly did not work alongside claimant at the time of the alleged injury, and consequently could give no testimony as to the alleged occurrence. As to the "superiors" testifying to that effect, the record again fails to measure up to appellees' expectations. Only two testified—Lukehardt and Williams. Lukehardt, the sub-foreman, under whose direct

supervision claimant worked, could not remember any accident being reported to him at all, although he did recall Haddon's chronic complaints about his back, which Haddon did not attribute to any alleged accident. He also testified there was no change in the type of work Haddon performed after June, 1942. Williams, who was the general plumbing foreman, merely testified that he recalls the sub-foreman reporting an accident to him verbally, that Haddon complained to him about his back at various times, without attributing his trouble to any particular incident, and that he was given lighter work to perform because of his back. How does this bear out appellees' contention the "superiors" testified to the injury and its immediate and continued effects?

On the contrary it is significant that claimant failed to produce even one fellow employee who actually witnessed the alleged accident, and who could testify as to the injury and its immediate consequences.

REPLY TO APPELLEES ARGUMENT

In the announcement of the general principles of law governing the Longshoremen's Act, appellees are cautious in not admitting that the findings of the deputy commissioner must be supported by *substantial* evidence, which has been defined by the federal Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Consolidated Edison Co. v. Nat. Labor Rel. Board, 305 U. S. 197, 229, 83 L. Ed. 126, 140;

Nat. Labor Rel. Board v. Columbian E. & S. Co., 306 U. S. 292, 299, 83 L. Ed. 660, 665.

This reluctance to make such an admission implies a weakness per se in the facts, for otherwise the issue would not be so studiously avoided.

At page 11, the statement is made that "while the physicians employed by appellants *thought the injury could not cause the disability*, the expert appointed by the deputy commissioner was of a contrary opinion."

This is an obvious misstatement, for it assumes that the doctors employed by appellants found disability present. Such is not the case however, for both of appellants' medical experts reported that they found *no disability whatsoever* from either a neurological or orthopedic point of view.

On page 11 also, a number of cases are cited in support of the statement that even in the absence of a difference in medical opinion, the deputy commissioner may rely upon his own observation and judgment in conjunction with the evidence. Each of the cases cited, with the exception of three about to be named, are discussed in appellants' opening brief, and therefore further comment thereon would be needless repetition.

Liberty Mutual Ins. Co. v. Marshall, 57 F. Supp. 177 (D. C. Wash. 1944), is the subject of appeal in this

court, and therefore should not be accepted as an authority until and unless the decision be affirmed.

In *McNeelly v. Sheppeard,* 89 F.(2d) 956 (C. C. A. 5, 1937), the deputy commissioner *denied* compensation. The claimant contended on appeal that his evidence demanded a finding that pneumonia and infection arose naturally out of his employment. Claimants' physician testified in favor of causal relation but admitted that pneumonia could come from other causes, and sometimes without any exposure at all. The circuit court affirmed the *denial* of the award. This is a case therefore where the evidence left it questionable whether the pneumonia was caused by the working conditions or from causes having no connection thereto. The physician's opinion invited only speculation as to the efficient cause.

Therefore denal of an award was perfectly justified, the court making this apt remark which is applicable here:

> "Compensation under the act is not the equivalent of health or life insurance."

Independent Pier Co. v. Norton, 54 F.(2d) 734 (C. C. A. 3, 1931), does not involve the issue of causality as such, but merely a question of continuing disability from an injured knee that had already been the subject of a compensation award.

In *Contractors, P. N. A. B. v. Pillsbury* (C. C. A. 9)

..... F.(2d) ....., cited at page 10, the question involved was whether the contraction of pulmonary tuberculosis was due to working conditions. One physician testified that the disease could have developed since the commencement date of the employment. Another physician gave as his opinion that the employee suffered from a reactivated type of the disease. A document from an officer of the Navy Medical Corps confirmed the testimony of the claimant that he was free of tuberculosis before he left the mainland to work on the project. It will therefore be seen that there was ample medical evidence to sustain the finding.

On page 12, appellees' state that notwithstanding sharp conflict in the evidence, the injured employee's testimony alone is sufficient to sustain an award in his favor. However *Independent Pier Co. v. Norton,* 54 F.(2d) 734 (C. C. A. 3, 1931), cited in support thereof, did not involve a question of causal relationship, but merely the degree of disability whch the employee was suffering as the result of an admitted injury to the knee. Certainly, that case does not stand for the proposition that an employee's testimony alone is sufficient to establish causality from a medical standpoint.

Also on page 12, appellees argue that the award herein entered may be supported by "the common-sense of the situation." Cited in support thereof are *Commercial Casualty Ins. Co. v. Hoage,* 75 F.(2d) 677 ((App.

D. C. 1935), and *Avignone Freres, Inc., v. Cardillo,* 117 F.(2d) 385 (App. D. C. 1940). In each of those cases there was ample medical testimony to support the award, and the *medical testimony itself* was used in arriving at the "common-sense of the situation."

Conceding arguendo, that the causal connection between an accident and the subsequent disability does not require support by medical opinion, where an accident results in immediate injury and disabilty, and the pain and disability is more or less continuous from that time on, the condition not having existed before the accident, it is submitted that the facts in this case do not fall within the rule. Here we have an employee who lost no time from his work on account of any alleged disability, whose chronic complaints concerned a sore back and leg cramps that he attributed to a vitamin deficiency in the drinking water, to his kidneys, and to his "discomfortable" bed, but never to any alleged accdent, *until approximately nine months later when he contracted a cold that settled in his back,* whose work record was exemplary, who finished out his contract and made no claim concerning any alleged accident upon the forms handed to him for that purpose upon returning to the mainland. How can it be said therefore with any convincing force that the award can be supported by the "common sense of the situation" alone?

The cases cited by appellees in support of the propo-

sition that medical testimony is not necessary to establish causal relationship, involve in the most part injuries where the disabilities flowing therefrom are so immediate and obvious, that laymen in ordinary walks of life can infer cause from effect. The cases of *Wroten v. Woodley Petroleum Co.,* 124 So. 542 (La. 1929), and *Pierron v. Prudential Ins. Co.,* 30 N. E. (2d) 563 (Ohio 1942), definitely fall within this category.

It should be noted that in *Dinoni v. Vulcan Coal Co.,* 297 Pac. 721 (Kan. 1931), compensation was *denied* despite the testimony of causal connection by a physician in view of the fact that the other evidence, viz., a second fall producing a fractured kneecap and necessitating an operation, contradicted and raised an issue as to whether the infection developed from the second injury or the first one.

In *Utah-Delaware Min. Co. v. Ind. Com'n,* 289 Pac. 94 (Utah 1930), the applicant was injured severely in the region of the right kidney, and no opinion was advanced and no reason given by the physician that if the diseased and infectious condition of the kidney and of the gall bladder were not attributable to the injury, to what likely or probable cause or causes they were attributable.

The cases of *Jarka Corp. v. Norton,* 56 F.(2d) 287 (D. C. Pa. 1930), *Southern Steamship Co. v. Norton,* 41 F. Supp. 108 (D. C. Pa. 1941), *Frank Marra Co. v. Nor-*

ton, 56 F.(2d) 246 (D. C. Penn. 1931), and *Ryan Stevedoring Co. v. Norton,* 50 F. Supp. 221 (D. C. Penn. 1943), have already been discussed in appellants' opening brief, and therefore further comment herein is unnecessary.

Liberty Mut. Ins. Co. v. Williams (Ga. 1932) 161 S. E. 853, *Kempa v. Pittsburg Terminal Coal Corp.* (Pa. Super. 1938) 3 Atl. (2d) 34, *M. P. Moller Motor Car Co. v. Unger* (Md. 1934) 170 Atl. 777, and *Ross v. Riffle* (Pa. 1932) 164 Atl. 913, are cases where the connection between the injury and disability is so direct and immediate, that the award need not depend upon the testimony of professional witnesses, since laymen in ordinary walks of life can infer cause from effect.

In *Southern Cement Co. v. Walthall* (Ala. 1928) 117 So. 17, there was medical testimony to support causality.

Provident Life & Acc. Ins. Co. v. Diehlman (Ky. 1935) 82 S. W. (2d) 350, is not a compensation case, but an action on an insurance policy. There was medical evidence pro and con as to the cause of death, which clearly presented an issue for the jury.

In *Schroeder v. Western Union Tele. Co.* (Mo. 1939) 129 S. W. (2d) 917, insanity developed within a few hours after a head injury. There was no evidence of pre-existing insanity. In view of the peculiar facts of that case, the causal link could properly have been

found without the aid of medical testimony, since the connection between the injury and disability was natural, direct and immediate.

In *De Filippo's case* (Mass. 1933) 188 N. E. 245, the court recognizes the rule that where the relation between cause and effect must be proved, an expert's testimony that such relation is merely "possible," "conceivable" or "reasonable" without more, is insufficient to prove relation.

In *Hartford A. & I. Co. v. Ind. Com'n* (Utah 1924) 228 Pac. 753, the question was whether Parkinson's disease was caused by a fall suffered about five months previously. Four physicians testified as to the nature of the disease and to its probable causes. While none of them were very conclusive in their opinions, there was testimony that the injury was the *probable* cause. This coupled with the pre-existing good health of the employee and the doctor's failure to attribute the disease to other causes, was held sufficient to sustain the award.

CONCLUSION

It is surprising that while appellees saw fit to devote considerable space in their brief to the announcement of general principles and citations therefor which appellants frankly conceded at the outset, they failed to discuss or even refer to three decisions cited by appellants which go to the very essence of this appeal. They

are *Standard Acc. Ins. Co. v. Nicholas,* 146 F.(2d) 376 (C. C. A. 5, 1944), *Pacific Employers Ins. Co. v. Ind. Acc. Com.,* 118 P.(2d) 334 (Cal. 1941), and *Cutler v. Bergen, etc. Co.,* 25 Atl. (2d) 75 (Pa. 1942). And of *Burton v. Holden & Martin Lbr. Co.,* 20 Atl. (2d) 99 (Vt. 1941), the only comment is that it "appears" to be a minority holding. The failure to discuss or attempt to distinguish these cases by giving them this silent treatment can only mean that these authorities directly sustain appellants' position and if followed by this court, would result in a setting aside of the award entered herein.

Respectfully submitted,

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